

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05CV0329-GKF-PJC

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE* PERTAINING TO
RULE 26(E) EXPERT "ERRATA" [DKT. #2424]**

Defendants respectfully submit this brief in opposition to Plaintiffs' Motion *in Limine* precluding Defendants from referring to: (1) the fact that certain expert errata were submitted by Plaintiffs' retained experts, or (2) what precipitated the need for Plaintiffs' retained experts to submit expert errata. Such evidence is relevant and probative, and is not confusing, misleading, or unfairly prejudicial. Accordingly, Plaintiffs' Motion should be denied.

AUTHORITY

Evidence is considered relevant to the extent that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. "The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995) (quoting *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978)).

DISCUSSION

Plaintiffs’ evidence – and, particularly their proffered experts’ analyses – has in this litigation been riddled with error. As observed by U.S. Magistrate Judge Sam A. Joyner, Plaintiffs’ experts’ “*numerous* miscalculations are *extremely unfortunate*.” Opinion and Order, Dkt. No. 1878, at 4 (emphasis added). Magistrate Judge Joyner concluded that the “excessive” errata, submitted in the form of supplemental reports by Plaintiffs’ experts, was “in some cases *close to the size of the original report*.” *Id.* (emphasis added).

Several of Plaintiffs’ expert witnesses – including some surviving (in part) *Daubert* challenges – submitted errata, *e.g.* Engel, Olsen, Stevenson, Welch, and Wells. While these designated experts may be permitted to testify at trial, each is subject to “[v]igorous cross-examination[and] presentation of contrary evidence[which] are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Not a single case cited in Plaintiffs’ Motion *in Limine* supports their contention that evidence regarding their designated-experts’ errata is inadmissible. In fact – and quite to the contrary – each case Plaintiffs rely upon contemplates examination at trial on the subject of the errata. *See* Plaintiffs’ Motion *in Limine* Pertaining to Rule 26(e) Expert “Errata,” Dkt. No. 2424, *citing* *Crowley v. Chait*, 322 F. Supp. 2d 530 (D.N.J. 2004) (noting that expert report revisions may “damage the credibility of their findings” and raise questions “go[ing] to the weight and credibility of the testimony”; also relying, in part, upon *Voilas v. General Motors Corp.*, 73 F. Supp. 2d 452, 461 (D.N.J. 1999), which concluded that an expert’s errors may not preclude testimony on reliability grounds but “rather is proper fodder for cross-examination”); *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 6-7 (D.D.C. 2005) (trial court allowing limited written errata,

but noting that “it would have been more appropriate” to highlight, in direct testimony, the errors and corrections with proper explanations; also noting that the opposing party had insufficient time to “adequately prepare for cross-examination with respect to the new report”); *Palmer v. Asarco Inc.*, 2007 WL 2254343 (N.D. Okla. 2007) (denying an expert opportunity to testify regarding new opinions and noting that while a party might be permitted to seasonably supplement expert opinions, this “does not give license to sandbag one’s opponent”) (internal cites omitted); *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 527 (S.D.N.Y. 2001) (in holding that report, containing “certain corrections,” was not excluded, court noted that certain inconsistencies “will no doubt be exploited ... on cross-examination”); *In re Commercial Financial Services, Inc.*, 350 B.R. 520, 557-58 (Bkrtcy. N.D. Okla. 2005) (concluding that errors deemed “satisfactorily explained” did not render expert’s opinion unreliable, but acknowledging that the expert’s opinions “may be challenged at trial”).¹

In short, while Plaintiffs here may argue that their experts’ “excessive” volume of supplemental reports and “numerous miscalculations,” Opinion and Order, Dkt. No. 1878, at 4, somehow “strengthen[] the quality of the[ir] expert report[s],” Plaintiffs’ Motion *in Limine*, Dkt. No. 2424 at 4 (*citing Crowley* at 540), Defendants will contend differently. Indeed, Defendants will subject Plaintiffs’ designated-experts to the type of “[v]igorous cross-examination” described by the U.S. Supreme Court in *Daubert*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469, and a component of this cross-examination will include the errors committed by the

¹ Unlike the experts in *Crowley* and *In re Commercial Financial* who identified and corrected their own mistakes, at least one of Plaintiffs’ experts, Roger Olsen, conceded certain mistakes (corrected in a third errata) only after the mistakes were demonstrated by Defendants’ experts Charles Cowan and Glenn Johnson. *See e.g.* Joint Defense Motion to Exclude Testimony of Dr. Roger Olsen, Dkt. No. 2082, at 15. Thus, any claim that the error corrections may have “strengthen[ed] the quality of the expert report” seem dubious.

witnesses in preparation of their opinions. This, surely, is proper cross-examination and evidence.

Upon preparing opinions and proffering them with the “numerous miscalculations” referenced by Magistrate Judge Joyner, Plaintiffs and their experts created an issue regarding the credibility of that work – and the soundness of Plaintiffs’ case – which should be considered by the trier-of-fact. Accordingly, Defendants should not be limited in presenting evidence of the errata submitted by Plaintiffs throughout the duration of this litigation, including the written errata proffered by Engel, Olsen, Stevenson, Welch, and Wells.

CONCLUSION

For these reasons, Plaintiffs’ Motion for an order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding the fact that certain expert “errata” were served by Plaintiffs, or the circumstances that precipitated the need for the service of such errata, should be denied, and Defendants further request any and all other relief to which they may be entitled.

Respectfully submitted,

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